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JUN 08 2009

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

ROY G. COOKSEY

COMPLAINANT

v.

**MEMORANDUM IN SUPPORT OF
BOWLING GREEN MUNICIPAL UTILITIES BOARD'S
MOTION TO DISMISS**

BOWLING GREEN MUNICIPAL UTILITIES BOARD and
WARREN COUNTY WATER DISTRICT

DEFENDANTS

Comes the defendant, Bowling Green Municipal Utilities Board (“BGMU”), by counsel, and in support of its motion to dismiss the Verified Complaint and Petition filed against it by Roy G. Cooksey (“Cooksey”), states as follows:

INTRODUCTION

No statute grants jurisdiction to the Public Service Commission (“PSC”) over the matters Cooksey seeks to raise in his Complaint. As a city-owned supplier of water and sewer services, BGMU is expressly exempted from the definition of a “utility,” and is therefore generally exempt from PSC jurisdiction. Although the court in **Simpson County Water District v. City of Franklin**, 872 S.W.2d 460 (Ky. 1994) set forth an exception to this exemption, that exception is not applicable here. Cooksey’s Petition involves a complaint by a customer over the territorial boundary lines between BGMU and the Warren County Water District (the “WCWD”), not an issue of rates or services arising out of a contract under which BGMU

provides a commodity or service to the WCWD. Accordingly, the PSC has no jurisdiction over this matter and Verified Petition and Complaint filed by the complainant should be dismissed.

STATEMENT OF THE CASE

In his Verified Petition and Complaint (“Complaint”), Cooksey alleges that he owns a large tract of land comprising approximately 101 acres. Complaint, ¶ 1. Cooksey complains that the boundary lines established by agreement between BGMU and the WCWD via the Joint Engineering, Planning and Finance Committee created by the two entities has resulted in part of his property receiving water and sewer service from the WCWD and the other portion receiving water and sewer service from BGMU. Complaint, ¶ 3. According to Cooksey, the fact that his entire property does not receive water and sewer service from the single entity of his choice constitutes discrimination. Specifically, Cooksey alleges that the water and sewer service provided by BGMU will be more costly for him, and he therefore asserts that he is entitled to receive service for his entire property from the WCWD. Complaint, ¶¶ 3, 6.

ARGUMENT

The Public Service Commission does not have jurisdiction over the purported controversy alleged by Cooksey. Cooksey’s reliance upon the decision in **Simpson County Water District v. City of Franklin**, 872 S.W.2d 460 (Ky. 1994) in support of his argument that jurisdiction exists is misplaced. *See* Complaint, ¶ 5. Despite Cooksey’s attempt to characterize the issue in this case as arising from the provision of utility “services,” the actual issue is a disagreement regarding the boundary lines between the *service areas* of a utility, the WCWD, and a non-utility, BGMU. Because BGMU is not a “utility” under KRS Chapter 278, and because this case is not a dispute over “services” arising from a contract between BGMU and the WCWD, but rather over boundary lines, the PSC does not have jurisdiction.

The PSC “is a creature of statute and has only such powers as have been granted to it by the General Assembly.” **Boone County Water and Sewer Dist. v. Public Service Com'n**, 949 S.W.2d 588, 591 (Ky. 1997); *see also* **Public Service Com'n of Ky. v. Attorney General of Com.**, 860 S.W.2d 296, 298 (Ky. App. 1993) (“The PSC's powers are purely statutory.”); **Public Service Com'n v. Blue Grass Natural Gas Co.**, 197 S.W.2d 765, 767 (Ky. 1946) (“The power of the Public Service Commission to deal with and regulate public utilities is authorized, controlled, and restricted by Chapter 278.”). No statute grants the PSC the power to establish or change the territorial boundary lines for a city-owned provider of water and sewer services such as BGMU.

Pursuant to KRS 278.260, the PSC has “original jurisdiction over complaints as to rates or service of any utility.” KRS 278.260(1). (Emphasis supplied). City-owned providers of water and sewer service such as BGMU, however, are specifically exempted from the definition of a “utility” under KRS Chapter 278. According to KRS 278.010(3):

- (3) “Utility” means any person except...a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:
 - (d) The diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation; [or]
 - (f) The collection, transmission, or treatment of sewage for the public, for compensation...

(Emphasis supplied). *See also* **City of Greenup v. Public Service Com'n**, 182 S.W.3d 535, 538 (Ky. App. 2005) (“KRS 278.010(3)(d) exempts from the definition of a utility a city which distributes or furnishes water to the public for compensation.”) Because BGMU is not a “utility,” it is not generally subject to regulation by the PSC.

In **Simpson County Water District v. City of Franklin**, relied upon by the complainant, the court recognized that cities are generally exempt from regulation by the PSC, but held that a city “waives its exemption when it contracts with a regulated utility upon the subjects of rates

and service.” **Id.** at 462. This holding was based upon the court’s interpretation of KRS 278.040(2), which provides as follows:

The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

(Emphasis supplied). Because the City of Franklin had contracted to provide water to the Simpson County Water District, the court held that the PSC had jurisdiction over the rates charged by the City to the District. Although the issue in Simpson County involved only rates, the court indicated that the exception to the general exemption for cities from PSC jurisdiction also applies to services. **Simpson County**, 872 S.W.2d at 462.

The actual issue raised by Cooksey in this matter is a complaint by an individual about the territorial boundaries established by agreement between a utility and a city, not an issue of rates or service. Although the complainant attempts to characterize this matter as a “service” issue, and thus rely upon the court’s opinion in **Simpson County**, issues regarding the boundary lines between service areas for a utility and a non-utility do not constitute “service” issues as such term is used in the court’s opinion or in KRS 278.040(2). Commenting on the application of the “exception to the exemption” for services, the court in **Simpson County** stated that “the service regulation over which the Commission was given jurisdiction refers clearly to the quantity and quality of the commodity furnished as contracted for...” **Id.** at 464. (Emphasis supplied). In KRS 278.010(13), “service” is defined as follows:

“Service” includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility...

Interpreting this statute, the court in **Benzinger v. Union Light, Heat & Power Co.**, 170 S.W.2d 38 (Ky. 1943), opined that “the legislature only intended for the word ‘service’ to apply to and comprehend ‘quality’ and ‘quantity’ of the product to be served...” **Id.** at 41; *see also* **Peoples Gas Co. of Ky. v. City of Barbourville**, 165 S.W.2d 567, 571 (Ky. 1942) (The regulation of service “clearly refers to the quantity and quality of the commodity furnished...”). In this case, the complaint does not refer to the quantity or quality of a commodity provided to a utility by a city, but rather objects to which of two entities provides such commodity directly to a consumer. Because the “legislature has conferred upon cities an exemption from the PSC’s power to regulate local utilities in every area except as to rates and services,” the PSC has no jurisdiction over the boundary lines of the territory in which BGMU operates. **Simpson County**, 872 S.W.2d at 462.

Even if Cooksey’s allegations could constitute a “service” issue, which is denied, the PSC would still have no jurisdiction over this case, because the issue raised in the complaint does not arise out of a contract between a non-regulated municipality for the provision of a commodity or other service to a regulated utility. Citing to the **Simpson County** opinion, the court in **City of Greenup v. Public Service Com’n**, 182 S.W.3d 535 (Ky. App. 2005) recognized that as “a municipal water system, [the City of] Greenup’s water system is not, in the absence of a contract to provide utility services to a regulated utility... subject to regulation by the PSC.” **Id.** at 536. (Emphasis supplied). According to the Court:

[T]he PSC does not have jurisdiction over utility services furnished by a municipality except to the extent that those services are rendered pursuant to a contract with a utility which is regulated by the PSC. In such cases the municipality, in the matters covered under the contract, is subject to the jurisdiction of the PSC.

Id. at 538. (Emphasis supplied). In fact, the issue in the **Simpson County** case, as articulated by the court, was not simply whether the PSC has jurisdiction over the rates and services provided by cities under any circumstances, but “whether, under the act, a city waives its exemption from PSC regulation by contracting to supply a commodity to a PSC-regulated entity.” **Simpson County**, 872 S.W.2d at 462. In its analysis of this issue, the court distinguished cases involving the rates charged for water service by a municipality to its individual customers, noting that such cases were inapplicable because “the municipality was not selling water to a PSC-regulated entity.” **Id.** at 464. Thus, under Kentucky law, the PSC only has jurisdiction over services provided by a city to the extent that those services are provided pursuant to a contract under which the city supplies a commodity to a PSC-regulated utility.

As set forth above, the complaint does not raise issues of rates or services arising from a contract by a non-utility to supply a commodity to a PSC-regulated utility. Instead, the complainant seeks to have the PSC alter the boundary lines between the territory of a utility, WCWD, and a non-utility, BGMU. Specifically, Cooksey objects that a portion of his property falls within the territorial boundaries of BGMU, within which BGMU *directly* provides water and sewer services to its customers (as opposed to supplying water or any other commodity to a PSC-regulated entity pursuant to a contract). In **Simpson County**, the court explicitly distinguished cases involving issues of territorial boundary lines from the issue of jurisdiction over rates and services in the context a contract for a city to supply a commodity to a PSC-regulated entity. Specifically, the court distinguished the case of **City of Georgetown v. Public Service Com’n**, 516 S.W.2d 842 (Ky. 1974), wherein “the parties were engaged in a dispute of territorial jurisdiction, between a private utility and a city utility,” noting that the “rates and service exception had no relationship to” such issues. **Simpson County**, 872 S.W.2d at 464. As

in **City of Georgetown**, the issue raised by Cooksey involves the territorial boundary line between a PSC-regulated utility and a municipal provider of water and sewer services, which has “no relationship” to the rates and service exception at issue in **Simpson County**. **Id.**

In **City of Georgetown v. Public Service Com’n**, the court held that the PSC did not have jurisdiction to resolve a territorial dispute between a city-owned water supply system and a privately owned water supplier. **City of Georgetown**, 516 S.W.2d at 845. Additionally, in **In the Matter of: City of Hawesville v. East Daviess County Water Association, Inc.**, 2004 WL 2039467 (Ky. P.S.C. 2004) (Slip Copy), this Commission concluded that it had no jurisdiction over a territorial dispute between a municipal service provider and a public utility. According to this Commission:

Hawesville presents no issue related to East Daviess's rates or service. Its requested relief is a Commission directive prohibiting East Daviess from extending water service into areas that Hawesville presently serves.

Nothing within KRS Chapter 278 authorizes this Commission to establish or enforce exclusive service territories for water utilities. *See Kentucky Utilities Co. v. Pub. Serv. Com'n*, Ky., 390 S.W.2d 168, 175 (1965) (stating that existing utilities do not “have any right to be free of competition.”). **Kentucky-American Water Co.**, Case No. 91-359 (Ky. P.S.C. Apr. 17, 1992); **Mountain Utilities, Inc. v. Equitable Gas Co.**, Case No. 91-316 (Ky. P.S.C. Apr. 6, 1992). *Cf. Re Flowing Wells, Inc.*, 180 PUR 4th 117 (Ind. URC 1997). Neither KRS Chapter 96, which governs the operation and governance of municipal utilities, nor KRS Chapter 273, which governs water associations, conveys such authority to the Commission.

The Commission lacks any legal authority to resolve territory disputes that arise between municipal water utilities and public water utilities. **City of Georgetown, Kentucky v. Pub. Serv. Com'n**, Ky., 516 S.W.2d 842, 845 (1974) (“While it may be desirable that the Public Service Commission resolve this type dispute because of its expertise in this area, this is of legislative, not judicial, concern, and we feel compelled to follow the clear language of KRS 278.010(3).”). *See also City of Lawrenceburg, Ky. v. South Anderson Water District*, Case No. 1996-00256 (Ky. P.S.C. Jun. 11, 1998).

Id. Although no actual dispute exists between BGMU and the WCWD as to the appropriate territorial boundary lines between the two, the relief requested by the complainant in this matter is the same as that sought by Hawesville in the case above. Here, an individual consumer requests that the PSC issue a directive regarding the boundary between the service territory of a municipal service provider and that of a public utility, an issue over which the PSC has explicitly held that it “lacks any legal authority.” **Id.** Because BGMU is not a “utility” and is therefore generally exempted from PSC regulation, the exception to the exemption set forth in **Simpson County** does not apply. The PSC has no jurisdiction over disputes regarding service territory, and therefore the PSC has no jurisdiction over this matter. *See Id.*; **City of Georgetown v. Public Service Com’n.**

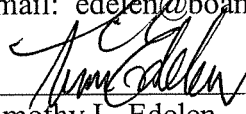
CONCLUSION

BGMU is expressly exempted from the definition of a “utility,” and is therefore generally exempt from the jurisdiction of the Public Service Commission. The exception to this exemption set forth in **Simpson County Water District v. City of Franklin**, 872 S.W.2d 460 (Ky. 1994) is not applicable in this case. This case involves a complaint by a customer about the territorial boundary lines between BGMU and the WCWD, not an issue of rates or services arising out of a contract under which BGMU provides a commodity to the WCWD. Accordingly, the PSC has no jurisdiction over this matter and Verified Petition and Complaint filed by the complainant should be dismissed.

In the alternative, should the PSC determine that it does have jurisdiction over this matter, BGMU respectfully requests that it be granted additional time in which to file an answer to the Verified Complaint and Petition.

This 5th day of June, 2009.

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This is to certify that a true and exact copy of the foregoing has this day been mailed to:

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This 5th day of June, 2009.



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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO. 2009-00190

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JUN 08 2009

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

ROY G. COOKSEY

COMPLAINANT

v.

ORDER OF DISMISSAL

BOWLING GREEN MUNICIPAL UTILITIES BOARD and
WARREN COUNTY WATER DISTRICT

DEFENDANTS

Defendant Bowling Green Municipal Utilities Board having moved the Commission to dismiss this action, based upon the Commission's lack of jurisdiction over the subject matter alleged in the Cooksey Complaint, and the Commission otherwise being sufficiently advised;

IT IS HEREBY ORDERED that this action is dismissed, with prejudice.

This _____ day of June, 2009.

BY: _____
Public Service Commission

ATTEST:

Executive Director

Commission, please sent copies to:

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